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Supreme Court of the United States

OCTOBER TERM 1932.

Nos. 98, 99, 100.

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, and OLEN MONTGOMERY,

Petitioners,

vs.

THE STATE OF ALABAMA.

HAYWOOD PATTERSON,

Petitioner,

vs.

THE STATE OF ALABAMA.

CHARLIE WEEMS and CLARENCE NORRIS,

Petitioners,

vs.

THE STATE OF ALABAMA.

BRIEF FOR RESPONDENT

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I

Opinions of the Court Below

The cases are before this Court pursuant to certiorari granted May 31, 1932. The opinions of the Supreme Court of Alabama are reported as follows:

Patterson vs. State, 141 So. 195, 224 Ala. 531;
Powell et al vs. State, 141 So. 201, 224 Ala. 540;
Weems et al vs. State, 141 So. 215, 224 Ala. 524.

The opinions of the Court below appear in these records on pages 167 of the Patterson record, 145 of the Powell record, 152 of the Weems record.

All the Court concurred in the opinions below with the exception of Anderson, Ch. J.

II

Jurisdiction

1. The jurisdiction of this proceeding is authorized by the Judicial Code, Section 237B as amended by an Act of February 13, 1925 (43 Stat. 937).

2. The opinions of the court below were returned on March 24, 1932 and applications for rehearing were denied on April 9, 1932.

3. Petitioners, in their motions for new trials claim that they were deprived of their constitutional rights in that (a) they were convicted without due process of law, (b) they were denied equal protection of the law.

III

Statement of the Case

The petitioners were convicted in the Circuit Court of Jackson County, Alabama of the crime of raping two young women, Victoria Price and Ruby Bates, residents of Huntsville, a city in Morgan County, Alabama. The crime is alleged to have taken place in a gondola car of a freight train while the train was traveling between the towns of Stevenson and Paint Rock. The young women, according to the testimony, boarded the train in Chattanooga, Tennessee and were en route to their home. The testimony shows that the petitioners, in order to effectuate their purpose, threw the white boys, with the exception of one, Gilly, off the train. A message was sent by wire to Paint Rock requesting that the petitioners be apprehended. At Paint Rock

the petitioners were taken off the train and carried to the town of Scottsboro, the county seat of Jackson County, the county in which the crime is alleged to have been committed. All of the above took place on March 25, 1931. On March 26, 1931 the Judge of the Circuit Court of Jackson County ordered the Grand Jury of that county to reconvene on March 30, 1931 and called a special session of the Circuit Court for April 6, 1931. The Grand Jury on March 31, 1931 returned indictments against these petitioners and defendants on that date were arraigned and counsel appointed to represent them. After conviction, motions for new trials were made and overruled. On an appeal to the Supreme Court of Alabama judgments of the said Court of Jackson County were affirmed.

IV

The Points Relied on by Petitioner

A

Due Process of Law

The trials of these cases were fair and impartial. Defendants were not denied due process of law in contravention of the 14th Amendment to the Constitution of the United States.

As this Court has oftentimes stated, it is impossible to give a correct and comprehensive definition of due process of law. The phrase "due process of law" antedates the establishment of our institutions and is endeared to our race by antiquity and historical association. It embodies one of the broadest and most far reaching guaranties of personal and property rights. It was incorporated into Section 1 of the 14th Amendment for the purpose of preventing states from denying to certain citizens or classes the same rights, protections and benefits as are given to others. It is necessary for the enjoyment of life, liberty and property that this constitutional guaranty be strictly complied with; however, it is imperative that this

Court under our system of Government see that the States be not restricted in their method of administering justice insofar as they do not act arbitrarily and discriminatingly.

The operation and effect of this clause of the 14th Amendment and various statutes can best be stated by referring to those leading cases of this Court dealing with questions analagous to the one at hand.

We quote from the case of Frank vs. Mangum, 237 U. S. 309:

> "The due process of law clause of the Fourteenth Amendment does not preclude a State from adopting and enforcing a rule of procedure that an objection to absence of the prisoner from the courtroom on rendition of verdict by the jury cannot be taken on motion to set aside the verdict as a nullity after a motion for new trial had been made on other grounds, not including this one, and denied. Such a regulation of practice is not unreasonable.
>
> "The due process of law clause of the Fourteenth Amendment does not impose upon the State any particular form or mode of procedure so long as essential rights of notice and hearing or opportunity to be heard before a competent tribunal are not interfered with; and it is within the power of the State to establish a rule of practice that a defendant may waive his right to be present on rendition of verdict."

The words "due process of law" have never been definitely defined as said by Mr. Justice Brown in Holden vs. Hardy,169 U. S. 366, 389:

> "This court has never attempted to define with precision the words 'due process of law' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

It is important to appreciate that "due process of law" is process according to the system of law obtaining in each State, and not according to any general law of the United States.

Missouri vs. Lewis, 101 U. S. 22, 31;
Hurtado vs. California, 110 U. S. 516, 535.

We gather from the cases above cited that a defendant in a criminal case has been accorded due process of law when there is a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the established course of judicial proceedings, and a right to be discharged unless found guilty; however, no particular form of procedure is required where the conditions just enumerated are fulfilled and there is no violation of the guaranty of due process of law regardless of whether the appellate court may approve of the verdict of the jury and the judgment based thereon. In other words, the question of due process is determined by the law of the jurisdiction where the offense was committed and the trial was had.

Missouri vs. Lewis, 101 U. S. 22, 31;
Hutardo vs. California, 110 U. S. 516,535;
Brown vs. New Jersey, 175 U. S. 172;
Jordan vs. Massachusetts, 225 U. S. 167;
Rogers vs. Peck, 199 U. S. 425;
Garland vs. Washington, 232 U. S. 642;
Missouri ex rel Hurwitz vs. North, 271 U. S. 40;
Miller vs. Texas, 153 U. S. 535;
Ong Chang Wing vs. United States, 218 U. S. 272;
Hodgson vs. Vermont, 168 U. S. 262.

In view of the rule set out in the case above cited the records in these cases disclose the fact that these defendants were not denied due process of law in that their trials were in all ways in accordance with the constitution and statutes of the State of Alabama which provisions are in no way attacked as being unconstitutional. Their trial was con-

ducted in compliance with the rules, practice, and procedure long prevailing in the State of Alabama. The court of last resort decided their cases in compliance with those rules of appeal and error which they apply in all cases.

The following procedure was followed in compliance with the requirements of the statutes of Alabama.

(a) An indictment was returned by a Grand Jury—Sections 4524, 4526, 4529, 4556 (88), 5202, 8616, 8617, 8630, 8632 and 8665 of the Code of Alabama, 1923.

(b) Petitioners were notified of the offense with which they were charged.—Sections 5568 and 8644, Code of Alabama, 1923.

(c) The date of trial was set by the trial judge.—Sections 5565, 8649 and 8650, Code of Alabama, 1923.

(d) Counsel were appointed to represent the petitioners. —Section 5567, Code of Alabama, 1923.

(e) Qualifications of jurors.—Section 14 of an Act approved February 20, 1931 (General Acts, 1931, page 56) same as Section 8603, Code of Alabama, 1923.

1

Counsel

Counsel for petitioners contend that they were denied due process of law in that they were not properly represented by counsel nor were counsel appointed for them as required by law. We agree with counsel for petitioners that under the laws of the State of Alabama the petitioners were entitled to counsel and that if they had been denied counsel they would have been deprived of their rights as guaranteed by Section 6 of Article 1 of the 1901 Constitution of Alabama.

The State of Alabama has done more than guarantee to the defendant the right to counsel but has by statute pro-

vided that when it appears to the Court that a defendant charged with a capital offense has not employed counsel that the Court shall appoint attorneys for his defense.

Section 5567, Code of Alabama, 1923, is as follows:

> 5567. When counsel appointed for defendant in capital case.—If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours.

A compliance with this section is shown on pages 87-101 of the Powell record, pages 118-133 of the Patterson record, and pages 85-99 of the Weems record. The petitioners were arraigned on March 31, 1931 at which time a Mr. Stephen R. Roddy, an attorney from Chattanooga, Tennessee, appeared and stated to the Court that he was there at the instance of friends of the then defendants but had not as yet received definite employment in the case. In view of this fact the Court desiring to give to the defendants all the protection which the Court could possible give them, appointed members of the Scottsboro bar. It must be borne in mind that at the time of the arraignment there were nine defendants and while the record does not disclose the number of attorneys practising at the Scottsboro bar, we venture to say that there were not as many as eighteen attorneys at that bar, the number which the Court could have appointed under the statute.

If there had been only one defendant, it does not seem plausible to us that he could correctly contend that he had been denied due process of law because the Court appointed more than two lawyers to represent him. This was at most, a mere irregularity which would not invalidate a conviction.

It appears to us from the colloquy between the Court, Mr. Roddy and Mr. Moody (pages 87-101, Powell record; pages 118-133, Patterson record; pages 85-99, Weems rec-

ord) that Mr. Roddy was in fact retained by friends of the then defendants and that those members of the Scottsboro bar who had investigated and prepared the case assisted Mr. Roddy when under the law they could not have been compelled to do so.

The following is a part of the colloquy which took place between the Court, Mr. Roddy and Mr. Moody of the Scottsboro bar:

> Mr. Roddy: If the court please, I am here but not as employed counsel by these defendants, but people who are interested in them have spoken to me about it as your Honor knows. I was here several days ago and appear again this morning but not in the capacity of paid counsel.
>
> * * * * * *
>
> Mr. Roddy: I would like to appear along with counsel that your Honor has indicated you would appoint.
> The Court: You can appear if you want to with the counsel I appoint but I would not appoint counsel if you are appearing for them; that is the only thing I am interested in. I would—to know if you appear for them.
>
> Mr. Roddy: I would like to appear voluntarily with local counsel of the bar. Your Honor appoints; on account of friends that are interested in this case I would like to appear along with counsel your Honor appoints.
>
> The Court: You don't appear if I appoint counsel?
> The Court: If you appear for these defendants, then I will not appoint counsel; if local counsel are willing to appear and assist you under the circumstances all right, but I will not appoint them.
>
> Mr. Roddy: Your Honor has appointed counsel, is that correct?

The Court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears.

Mr. Roddy: Then I do not appear then as counsel but I do want to stay in and not be ruled out in this case.
The Court: Of course, I would not do that. . . . . .

Mr. Moody: *Your Honor appointed us all and we have been proceeding along every line we know about it under Your Honor's appointment.*

Mr. Moody: I see his situation of course and I have not run out of anything yet. Of course, if your Honor purposes to appoint us, Mr. Parks, I am willing to go on with it. *Most of the bar have been down and conferred with these defendants in this case; they did not know what else to do.*

Mr. Procter: Now, your Honor, I think it is in order for me to have a word to say. When this case was up for arraignment, I met Mr. Roddy and had a talk with him, and I gathered from Mr. Roddy that he would be employed in the case, and he explained the situation to me that he was going back to see the parties interested and he thought probably there would be employed counsel in the case and I recognize the principle involved, and the fact that I took it for granted that Mr. Roddy would be here as employed counsel, and I was approached then to know if I was in a position to accept employment on the other side in the prosecution, and I thought under the circumstances I was. I am not trying to shirk duty, and I know my duty is whatever the Court says about these matters, but I did accept employment on the side of the State and I have conferred with the Solicitor with reference to matters pertaining to the trial of the case, and I think it is due the Court, I was not trying to shirk any duty whatever, and I want the Court to un-

derstand my attitude in the matter; I am ready to obey any order of the Court."

We wish to call to the attention of the Court the fact that Mr. Roddy, in an affidavit which appears on page 117 of the Powell record, avers that he represented the defendants throughout the trial. That part of the affidavit which is pertinent is hereafter set out.

> "Personally appeared before me, a Notary Public in and for the State and County, aforesaid, Stephen R. Roddy, of Chattanooga, Tennessee, who being first duly sworn, deposed as follows: That he appeared as one of the attorneys for nine negro boys who were tried and convicted in the Circuit Court at Scottsboro, Alabama. . . ."

Petitioners, as authority for their contention that they were deprived of counsel in contravention of the 14th Amendment, cite the cases of:

> Cook vs. United States, 267 U. S. 517, 537;
> Shepherd vs. State, 165 Ga. 460;
> Jackson vs. Commonwealth, 215 Ky. 800.

These cases are not in any way authority for their contention, although they do state correct principles of law: (1) That a prisoner should not be denied the right of counsel, (2) Nor should counsel appointed to represent a defendant be denied a reasonable time to prepare his case.

Headnote 4 of the Cook case, supra, is as follows:

> "Where the alleged contumacy was committed by sending a letter to the judge in chambers, and eleven days thereafter an order reciting the facts and adjudging contempt was entered and an attachment thereupon issued under which the accused was arrested forthwith and brought before the court, and, upon admitting authorship of the letter, was pronounced guilty because of it and of extraneous facts referred to by the judge as in aggravation, *and was forthwith punished,*

without being allowed to secure and consult counsel, prepare his defense and call witnesses, or to make a full personal explanation—Held that the procedure was unfair and oppressive and not due process of law."

The Shepherd case, supra, Headnote 1 lays down the principle that:

"Except under extraordinary circumstances in which counsel appointed to defend one on trial for his life are already thoroughly familiar with the facts and circumstances of the case, it may be stated as a general rule, essential to the preservation of the constitutional guaranty of benefit of counsel, that counsel appointed to defend one accused of a capital offense upon their request for a postponement in order to prepare a defense, are entitled to at *least as much as one entire day* for the preparation of the defense of the accused, even though the request for postponement be not based upon the absence of witnesses, and even though there be in fact no witness absent."

The petitioners in this case were not denied the right of counsel as was the fact in the Cook case, supra, nor were they put to trial on the same day on which counsel were appointed to defend them as was the fact in the Shepherd case, supra. On the other hand, the petitioners were represented by counsel from Chattanooga and by two members of the bar of Scottsboro. They were not put to trial until one week after counsel were appointed. The record affirmatively shows that counsel had conferred with them and had done everything that they knew how to do. (Statement by Mr. Moody hereinbefore set out)

This Court in the case of Henry Ching vs. United States, 254 U. S. 630 refused to review the Circuit Court of Appeals of the Ninth Circuit which Court rendered an opinion which we respectfully insist is in support of our contention that the petitioners were not deprived of their right to counsel. The opinion of the said Circuit Court of Appeals

is reported in 264 Fed. 639, a part of which is set out below:

> "It is contended that the court erred by compelling defendant over his objection to proceed to trial and in appointing an attorney to defend them. It appears that Ching, through Warren Williams, his counsel, had pleaded guilty, but at a later date the court declined to accept the plea of guilty which had theretofore been interposed, and ordered that a plea of not guilty as to both counts be interposed in behalf of defendant. On October 2, 1919, the case was called for trial; defendant and his counsel, W. J. Little, being present in open Court, Mr. Little asked permission to withdraw from the case. The court denied the request, and thereupon appointed Mr. Little to act as attorney for the defendant, and thereupon, both parties having announced themselves as ready, the trial was proceeded with.
>
> "When the case was called, counsel for the government stated that he did not see the defendant in court whereupon Mr. Williams, who had formerly appeared for the defendant, stated to the court that he had notified the defendant, who had notified him that Mr. Little had been employed by him to defend. Thereupon Mr. Little stated to the court that defendant had told him that he did not wish him to try the case. Mr. Williams then said that he had called the attention of the defendant to the matter and that defendant had assured him he would be ready with counsel to proceed with the trial. At this point the defendant appeared in person and was ordered into the custody of the marshall. Thereupon the case was called, whereupon Mr. Little expressed his wish to withdraw, stating that he did not represent the defendant, and that defendant said he did not wish him to represent him. Thereupon the court asked defendant what he would like to do with the case. Defendant replied that he would like to have it postponed for ten days. The court declined

to continue the case and appointed Mr. Little to defend Ching. No objection was made and the trial proceeded.

"We do not see that the action of the court was prejudical to the rights of the defendant. He was notified that his case had been set for trial; he had ample time to employ such counsel as he wished, and when Mr. Little was appointed to defend him no objection was made."

There was no demand or motion made for a continuance. However, such a motion would have been addressed to the discretion of the Court and under the facts of this case a denial thereof would not have been an abuse of the discretion vested in the Circuit Court.

Jones vs. Commonwealth, 38 S. W. (2) 251;
Commonwealth vs. Flood, 153 Atl. 152;
United States vs. Rosenstein et al, 34 Fed (2) 630;
Williams vs. Commonwealth, 19 S. W. (2) 964.

It thus appears that the trial court complied with every provision of law and extended every effort to afford to these petitioners the rights to which every citizen of the State is entitled and which the courts of this state have so zealously guarded regardless of color or creed. The defendants were represented by capable counsel, one of whom has enjoyed a long and successful practise before the courts of Jackson County.

Counsel, by their own statements, show that they not only had time for preparation of their case but that they knew and proceeded along proper lines for a week prior to the trial.

2

Change of Venue

Petitioners further contend that the refusal of the trial court to grant their petition or motion for a change of venue was a denial of "due process of law."

The right to a change of venue is statutory and is provided for in certain instances by Section 5579, 5580 and 5581.

The petition for change of venue is set out on pages 4 and 5 of all the records. The petition alleged that they could not have a fair and impartial trial in Jackson County because: (a) That newspaper articles had inflamed the minds of the public, (b) that a large crowd was present at the time the case was set for trial.

(a)

Newspaper Articles

The newspaper clippings which the petitioners alleged inflamed the public against them are set out on pages 5, 10, 14, 16 and 17 of all the records.

These articles relate the story of the alleged crime as the newspapers understood it and they also lament the fact that such an atrocious crime should have been perpetrated, but not once in any of them is there a single attempt to incite the people of Jackson County to mob violence nor do they contain anything which might be construed as attempting to prejudice the mind of any man who might be called to serve as juror on those cases. One of the articles expressly shows that the paper published in Scottsboro did not wish to prejudice anyone against the petitioners. In fact, it shows that the paper had tempered down the story.

There was not one scintilla of evidence introduced on the part of the petitioners to show that the newspaper articles clippings or editorials had so prejudiced the minds of the people of Jackson County that the appellants could not get a fair trial by an impartial jury of that county. It was not even shown that the Chattanooga News or Montgomery Advertiser had any circulation in Jackson County. The mere fact that certain newspaper stories were published about this matter does not, of itself, entitle a defendant to

a change of venue. It must be shown that the people of that county have been prejudiced thereby.

In the case of Malloy vs. State, 96 So. 57, the Supreme Court of Alabama held: "On change of venue motion, where there was no evidence indicating that a newspaper article would or did have any influence on public opinion in the county of trial, there was no error in refusing a copy of the paper in evidence."

The weight given newspaper articles as grounds for change of venue in the State of Alabama can best be shown by setting out a part of the opinion of the Supreme Court of Alabama in the case of Godau vs. State, 179 Ala. 27, 60 So. 908, 910:

> "The newspapers of Mobile,—and they were widely read and circulated there—teemed with sensational accounts of the murder, and in all these accounts the guilt of the defendant was assumed as a fact. Pictures of the defendant and of her daughter and of the dead policeman, as well as of the sheriff and probably of some of his assistants, also appeared in the Mobile papers, and, to be short, the newspapers of Mobile did all that newspapers can do to create the impression that the defendant was certainly guilty of the murder. In addition to this, they undertook to go into the past of the defendant. She appears to have been three times married, and it was broadly hinted in the papers that the defendant had murdered two, and probably all three of her husbands, and we presume they were read by everybody as one of the worst criminals. Whether the defendant deserved all that was said of her by the papers we do not know; but, as we read the articles as they appear in this record, the facts are as we state them.
>
> "So long as we have newspapers we may expect to have through them the report of crimes, and it is not to be unexpected that, when a homicide is committed

and discovered under circumstances like the present, even if the defendant's account of the entire matter is the truth, the newspapers of the community, answering the public interest, will furnish the defendant with at least some material upon which to base an application similar to the one under discussion. In the instant case the newspapers laid bare the real character of the deceased, and, if animosity was aroused against the defendant it was due to no appeal which was made to popular passion on account of the character of the man who was killed, but because of the character of the crime, the uncanny disposition of the body of the deceased, and the frightful hints as to the defendant's history."

In addition to the newspaper clippings the defendant, Godau, offered affidavits of 57 citizens of Mobile to the effect that the newspaper articles had so influenced the people of Mobile County against the defendant that she could not get an impartial trial therein.

The above case was cited by us to show that the Supreme Court of Alabama was merely following a long line of cases in holding that the petitioners did not make out a case entitling them to a change of venue because of certain newspaper articles. The defendant Godau was a white woman, and the newspaper articles connected with her case were much more vicious and more damaging than those of the present case and there was testimony to the effect that certain persons had been influenced thereby. So how can the petitioners be heard to say that the courts did not accord them the same process of law that had theretofore been afforded other persons charged with crime in this State, because they are of the colored race.

McClain vs. State, 62 So. 242;
Hawes vs. State, 7 So. 302;
Riley vs. State, 96 So. 599.

(b)

Crowd

It cannot be asserted as a correct principle of law that when a large crowd gathers at a court of justice that that fact alone entitles a defendant to a change of venue. There must be some hostility shown towards the defendant rather than the curiosity of a number of country men.

In the instant case there is not one particle of evidence to the effect that these petitioners were ever in danger of violence at the hands of any of the people of Jackson County, Alabama. If the citizens of that county had been as blood-thirsty, as lawless, as completely barren of all sense of right and justice as the petitioners in their brief would have this court believe, they would have mobbed the petitioners while they were still in Paint Rock, before they were brought to the county jail in Scottsboro. Where is there any evidence of threats against these petitioners. It may be true that a number of people assembled around the county jail when the petitioners were first incarcerated but this is easily understood when one realizes the circumstances of the people of that small town in the hills of north Alabama, and the manner in which they live. Scottsboro is typical of many of the small towns of the South. Very few, if any, industries are located there and the people earn their livelihood chiefly by agricultural pursuits. Each day is like the one that preceded it and the one that is to follow will be likewise. There is very little to keep many of them occupied. Very seldom anything occurs to change "the even tenor of their way," or as some might express it, "to break the monotony of an uneventful life." Anything out of the ordinary that tends to create excitement is grasped and "great crowds gather" to discuss the events or to see the persons or things which have been the means of creating or arousing interest. In a town of the size of Scottsboro the words "a great crowd" can not be taken in their ordinary sense, as a handful of people main-

ly the loafers of the town, constitute "a great crowd" in the eyes of the people of the villege.

In the absence of some overt act or acts, some manifestation of violence, some evidence of threats on the part of the "crowd" it cannot be correctly asserted that the presence of "the crowd" entitled the petitioners to a change of venue.

The petitioners, in support of their petition, called the Sheriff of Jackson County, Mr. Wann, and Major Starnes, the commanding officer of the National Guard Units sent to Scottsboro. If there were any two men connected with these cases who had an opportunity to know the feeling of the people of the county, they were those two men.

On direct examination Sheriff Wann testified:

> "I did not see any guns or anything like that and I did not hear any threats. I had this National Guard unit to accompany the prisoners to court when they were brought here several days ago. As Sheriff of this county I deemed it necessary for protection of the defendants for the National Guard unit to bring them to court. That was not only on account of the feeling that existed here against these defendants, but by people all over the county. I deemed it necessary not only to have the protection of the Sheriff's force but the National Guards."

On cross examination he said:

> *"It was more on the grounds of the charge that I acted in having the guards called than it was on any sentiment I heard on the outside. I have not heard anything as intimated from the newspapers in question that has aroused any feeling of any kind among a posse. It is my idea, as Sheriff of the county, that the sentiment is not any higher here than in any adjoining counties. I do not find any more sentiment in this county than naturally arises on the charge. I*

think the defendants could have as fair trial here as they could in any other county adjoining. From association among the population of this county, I think the defendants would have a fair and impartial trial in this case in Jackson County. That is my judgment. *I have heard no threats whatever in the way of the population taking charge of the trial. It is the sentiment of the county among the citizens that we have a fair and impartial trial."*—Page 18 of each of the records.

Major Starnes on cross-examination testified:

"I first came here, of course, under orders from the Governor and I have been here under his orders ever since. This is the third trip I have made here from Gadsden. In my trips over to Scottsboro in Jackson County and my association with the citizens in this county and other counties, I have not heard of any threats made against any of these defendants. From my knowledge of the situation gained from these trips over here, I think these defendants can obtain here in this county at this time a fair and impartial trial and unbiased verdict. I have seen absolutely no demonstration or attempted demonstration toward any of these defendants. I have seen a good deal of curiosity but no hostile demonstration. In my judgment, the crowd here was here out of curiosity and not as a hostile demonstration toward these defendants."

Thus it appears from the petitioners own witnesses that the "crowds" had gathered because of curiosity and not animosity.

(c)

Militia

The reason for the presence of the military forces is plainly set out in the testimony of Sheriff Wann, when called as a witness on the motion for a change of venue. (Records, pages 18 and 19) They were called out merely as a precaution and not to dispel any organized mob or be-

cause of the fact that threats and demonstrations had been made against these petitioners. The crime with which they were charged was a serious one, and the manner in which it was alleged to have taken place was unusual and the sheriff in calling out the militia was as anxious for his own protection as for the protection of the petitioners. He is charged with the duty of protecting all of those placed under his charge. He was conscious of the fact that he was also responsible for the protection of the good name of the State of Alabama, and that such crimes as the one with which these petitioners were charged naturally tended to raise the indignation of the public, no matter to what race the perpetrators might belong.

It does not seem reasonable that it could be held that because a sheriff of a county took precautionary measures for the protection of himself and of those charged with crime that that fact alone would deny due process of law to those charged with the commission of the crime. Nothing had been done by the people of Jackson County whereby the sheriff was compelled to call out or ask for assistance. And the guards were not necessary to disperse "crowd."

The Circuit Court of Appeals, Sixth Circuit, in the case of Bard & Fleming vs. Chilton, Warden et al, 20 Fed (2) 906, a case very similar to the instant case, held:

> "The petitioners were indicted in the Circuit Court of Hopkins County, Ky. for rape, convicted and sentenced to death. Their convictions were affirmed by the Court of Appeals of Kentucky. They applied to the United States District Court for release by habeas corpus, upon the claim that the state court trial had been in violation of their constitutional right to due process of law. Some of the questions now raised pertain to the preservation and exercise and right to a change of venue, for which the Kentucky Code *conditionally* provides. These questions were decided by the court of last resort in the state and they are not open now. They involve no constitutional question, ex-

cept as they touch the claim chiefly relied on, which is that the court and jury did not and could not give a free and impartial trial but acted under the coercion of the mob and the mob spirit in the community. The District Judge gave a patient hearing and listened to many witnesses. There was some testimony tending to show that the local situation and public excitement were such as to embarass or even prevent the giving of the constitutional fair trial; but the preponderance of evidence is to the contrary. The District Judge accepted such contrary view; and not only would we give respect to his determination, but we are compelled to reach the same conclusion.

"We are satisfied that there is no sufficient basis for sustaining petitioners' contention, *unless we must say as a matter of law that, where there is such public excitement that the state authorities think it prudent to call out the military force of the state to protect a respondent against unlawful violence and where the trial is held under the immediate protection of this military authority, and where some incipient disorder is by that force sternly suppressed, the trial, for that reason alone, is not due process of law. This we cannot say.*"

Headnote 3 of the case just above quoted is as follows:

"Trial under protection of state military force is not, as matter of law, prejudicial to defendants as to constitute denial of due process."

"Public excitement, such that state authorities think it prudent to call out the military force of the state to protect defendants against unlawful violence and the holding of trial under the immediate protection of military authority, are not as a matter of law, so prejudicial as to amount to a denial of due process, in violation of the Fourteenth Amendment of the Federal Constitution."

This Court denied petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, 48 Sup. Ct. 122, 275 U. S. 565.

Therefore, in the absence of a showing that the militia was actually needed to dispel mob violence, their presence in Scottsboro cannot be taken even as evidence of the fact that the trial was not fair and impartial.

3

Conduct of Trial

a

Demonstrations

There was no ruling of the court invoked as to the conduct of the trials other than on the motion for a new trial. Section 9518, Code of Alabama, 1928 (Michie) states the grounds for new trial.

Weems and Norris were tried first, then Patterson, then Powell, Roberson, Wright and Montgomery.

The motion for a new trial in the Weems and Norris case contains these allegations.—(Record, pages 65, 66)

> A new trial should be granted because of the state of excitement in Scottsboro, and when the jury reported in the case of these defendants, there was a public demonstration by the clapping of hands and hollowing in the court room in the courthouse when these defendants were tried as a result of the verdict of the jury in passing the death sentence. Because there was a demonstration in the court room and out on the streets outside of the court room when the jury reported its verdict against these defendants.

The motion for a new trial in the case of Powell et al contains the following averments: (Record, page 54)

> Because the defendants allege that before this trial came (the jury) before whom they were tried were around and about the court yards at the time the jury reported the death sentences in the case of Clarence Norris and Charlie Weems, that at the same time of said report of said jury there occurred a tremendous demonstration in the Courtroom loud enough to be heard a block away; that immediately the same demonstration by clapping of the hands and yells occurred on the outside of the court room and in the courthouse yard where jurors who tried the defendants could hear and did hear it. That such conduct was liable to have influenced the jury in this case.

The motion in the Patterson case contained these averments:

> While the trial was on, the jury in his case was asked by the court to withdraw to an adjoining room, and the jury in another case, to-wit: State of Alabama, vs. Weems and Norris, entered the court room and announced they found the said defendants, Weems and Norris, guilty and recommended the penalty of death to the sound of great applause, stamping of feet and jubilant shouting from the spectators which crowded the court room and from those who filled the environs of the courthouse, all of which the jury hearing the evidence in the trial of this defendant could not but have heard, to the irreparable hurt of this defendant, then on trial for his life.

In support of these allegations the petitioners in addition to their own affidavits called a number of the jurors several of whom testified that they heard a slight commotion but that it did not influence their verdict in any way and none of the jurors heard any commotion while they were serving as jurors. It does not appear that the defendants at any time made any objection or reserved any exception or asked for a continuance or mistrial nor does

it appear that the court failed promptly to suppress any misconduct that came to its notice.

The Supreme Court of Alabama has held that matters of this kind must be brought to the attention of the court during the trial in order that the court might prevent any further disturbance and also that he might interrogate the jury as to any effect the commotion might have had on them and to charge them they pay no attention to it. The highest court of the State of Alabama has held that a matter of this kind comes too late on a motion for a new trial.

> When it did not appear that any action of the trial court was invoked because of the applause of spectators before entering upon the trial, and where defendant did not move for a continuance on that ground, or ask any other ruling presenting anything more than the matter of the court's discretion, the denial of his motion for a new trial was not an abuse of discretion.
>
> Dempsey vs. State, 72 So. 773;
> Hendry vs. State, 112 So. 212.

In the Hendry case, supra, the Supreme Court of Alabama said:

> Misconduct of bystanders, an audience attending the trial, by way of applause while the trial is in progress, is highly reprehensible and should be promptly and vigorously suppressed in such manner that the jury is made to see the ugliness and injustice of such demonstration. When thus promptly and effectively handled by the court in best position to see and determine the proper measures to be taken, the verdict of the jury will not usually be disturbed because of such misconduct. Like other issues on appeal in this state, it must be made to appear that some action or nonaction of the court in the premises probably injuriously affected substantial rights of the defendant. The

record recites in general terms that the applause was promptly suppressed. It does not appear that vigorous counsel for defendant asked further action of the court. It will be presumed the court dealt with the matter effectively and properly. We find no error in refusing a new trial because of this occurrence.

State vs. Shellmon, 192 S. W. 435;
Bowers vs. United States, 244 Fed. 641;
Waters vs. State, 123 S. E. 806, 158 Ga. 510;
People vs. Ruef, 114 Pac. 54, 14 Cal. App. 576;
Horn vs. State, 73 Pac. 705, 12 Wyo. 80;
Stevens vs. State, 93 Ga. 307, 20 S. E. 331.

The only evidence submitted on the hearing for the motion for a new trial that the demonstration was of long duration and exceedingly loud was the affidavits of the petitioners. If these are sufficient to set aside a verdict of guilt it will be exceedingly difficult to ever get a verdict to stand. The court was cognizant of the facts surrounding the trial. He is presumed to do his duty. The petitioners state that there was a large crowd present, surely if the facts were as the petitioners represent them to be that there were some good and honest people who would have so testified.

-b-

Strategy of Counsel

Petitioners aver that the failure of the counsel representing them to argue the cases to the jury was caused by the fear of the crowd. This is nothing more than a conclusion of counsel. Counsel in the trial court were not afraid to reserve exceptions and to interpose motions. The strategy of counsel cannot be reviewed by the appellate courts. We do not know why counsel preferred not to argue the cases to the jury but that was a question entirely left to their judgment.

The courts of the State of Alabama have held that after the State had made its opening argument and counsel for the defense prefer not to argue that the trial court is correct in permitting the State to make a closing argument.

> "It was within the discretion of the trial court to permit an attorney, assisting the solicitor, in a prosecution for homicide, to close the argument, notwithstanding defendant's attorney had declined to make an argument."

Sheppard vs. State, 55 So. 514, 172 Ala. 363.

Objections to qualifications of jurors subject to challenge for cause, not raised in the trial court will not be considered on appeal.

Batson vs. State, 113 So. 300;
United States vs. Gale, 109 U. S. 65;
Tarrance vs. Fla., 188 U. S. 519.

4

Moore vs. Dempsey

The case of Moore vs. Dempsey, 261 U. S. 89, strenuously relied upon by petitioners is not here applicable.

Petitioners (Brief, pages 36-47) point out what they claim to be the similarities of the two cases, but in so treating the instant case they resort to conclusions of counsel in many instances.

Before going into the facts surrounding the trial of the Moore case, supra, it should be here noted that the case came to this court on an appeal from an order of the district court dismissing a petition for habeas corpus upon demurrer, the demurrers admitting the allegations of the petition. The Court said: "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the

trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the district judge should find whether the facts alleged are true, and whether they can be explained so far as to leave the state proceedings undisturbed."

In the instant case the allegations are in no way admitted but the records of the proceedings affirmatively show that the statements made by petitioners are mere conclusions and cannot be supported by the facts in the cases.

In the Moore case, supra, *it was admitted*:

(a) That the white people of the county had practically been at war with the petitioners. That a white man of that county had been killed. That the colored people of the county were in open rebellion against the whites.

(b) That the entire trouble was a conflict between the two races.

(c) That counsel for the colored people was nearly mobbed and compelled to leave the county.

(d) That the action of the colored people was termed an "insurrection" and a "Committee of Seven" appointed by the Governor to investigate.

(e) That shortly after the arrest of the therein petitioners a mob marched to the jail for the purpose of lynching them, but were prevented by United States troops and that a promise on the part of the "Committee of Seven" was the only thing that prevented their being mobbed."

(f) That the "Committee of Seven" caused certain colored witnesses to be whipped in order to make them testify against the petitioners.

(g) That on the grand jury which returned the indictment was a member of this "Committee of Seven"

and also several members of a posse organized to fight the blacks.

(h) That petitioners were put to trial on the same day counsel was appointed to defend them. That counsel had not conferred with petitioners.

(i) That blacks were systematically excluded from the jury.

(j) That the adverse crowd threatened anyone interfering with the desired result and that counsel did not venture to demand delay or ask for a change of venue.

(k) No witnesses were called for the defense nor were the defendants put upon the stand.

(l) Trial lasted only forty-five minutes.

(m) That there never was a chance for petitioners to be acquitted.

(n) That no juryman could have voted for an acquittal and continued to live in Phillips County.

(o) That if any prisoner had been acquitted he could not have escaped the mob.

In the case now before this Court none of the conclusions of the petitioners are admitted. The facts, as disclosed by the record, are:

(a) That the petitioners were not residents of Jackson County and that the people of that County had no personal animosity towards them.

(b) That the victims of the rape were not residents of Jackson County.

(c) That counsel representing petitioners were in no way interfered with in the performance of their duties.

(d) That no mob was ever organized to lynch the petitioners and that no threats of violence were made against them.

(e) That witnesses were not intimidated.

(f) That petitioners had benefit of counsel at least one week before trial.

(g) That the people of Jackson County did not try to intimidate the jurors.

(h) That witnesses were called for the defense and petitioners testified in their own behalf.

(i) That the record does not disclose any subsequent hostility toward the jurors who sat on the case in which a mistrial was had.

It is readily ascertained after a careful comparison of the facts of this case with the admitted facts of the Moore case, supra, that they are not in accord. The Moore case does not change the rule of law laid down in the case of Frank vs. Mangum, 237 U. S. 309, but this Court merely held that the facts admitted by the demurrer came within the principle of law set out in the Frank case.

> Where a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the court of justice, there is, in that court, a departure from due process of law in the proper sense of that term.

We respectfully insist that in this case the averments of the petitioners are mere conclusions and are not in any manner supported by the evidence. It seems apparent to us that counsel which were retained by "friends" of the petitioners after the actual trial of this case, and who were not present at the trial and therefore had no personal knowledge of the conduct of the trial framed their motions for new trials in every way possible to come within the case of Moore vs. Dempsey, supra. The averments are very similar but it was impossible for them to so change the facts. Those attorneys who represented the petitioners during the trial and who were familiar with the entire proceedings did not so frame their motion for a new trial. It

will be noted that where the facts alleged in the Moore case were not admitted, Frank Moore vs. Ark., 254 U. S. 630, this Court refused to reverse the judgment of the state court.

B

Equal Protection of the Laws

The Petitioners were not denied equal protection of the laws because of the fact that there were no members of their own race on the jury which convicted them.

The means of preparation of jury rolls, of appointing the members of the jury and the qualifications of jurors are fixed by an act of the Legislature of Alabama, 1931, approved February 20th, 1931 (General Acts, 1931, p. 56). Section 14 of the above cited act is identical with Section 8603, Code of Alabama, 1923, and is as follows:

> "The Jury Board shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or householder his name may be placed on the jury roll and in the jury box."

Under the rulings of this Court in numerous cases the constitutionality of the section above quoted cannot be doubted. This Court has repeatedly held that a state statute not discriminating against a certain race or class

because of their race, color or previous condition of servitude or other arbitrary disqualification but merely fixing the qualifications of jurors is not unconstitutional.

In the case of Franklin vs. South Carolina, 218 U. S. 161, 54 Lawyers' Edition 980, this Court held that a state law fixing the qualifications of jurors, which qualifications were practically the same as the Alabama statute now under consideration, was not unconstitutional.

> "We do not think there is anything in this provision of the statute having the effect to deny rights secured by the Federal Constitution. It gives to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."

Murray vs. Louisiana, 163 U. S. 101, 108;
Gibson vs. Mississippi, 162 U. S. 565;
Tarrance vs. State, 188 U. S. 519;
Williams vs. State of Mississippi, 170 U. S. 213;
Rives vs. Virginia, 100 U. S. 313.

This Court has held that when negroes are excluded solely because of their race or color, a negro defendant is denied equal protection of the laws in violation of Constitution U. S. Amendment 14, whether such exclusion is done through the action of the legislature, through the courts, or through the executive or administrative officers of the state.

Carter vs. Texas, 177 U. S. 442, 44 Lawyers' Edition 839;
Strander vs. West Virginia, 100 U. S. 303.

However, the mere fact that negroes are not on a jury does not entitle the defendant to have the venire quashed or a motion for a new trial granted. There must be proof in support of timely and proper motions or pleas that the jury commissioners purposely omitted the negroes from the venire solely because of their race or color and not because of their lack of the statutory qualifications.

In the case of Martin vs. Texas, 200 U. S. 316, it was held:

> "While an accused person of African descent on trial in a State court is entitled under the constitution of the United States to demand that in organizing the grand jury, and empanelling the petit jury, there shall be no exclusion of his race on account of race and color, such discrimination cannot be established by merely proving that no one of his race was on either of the juries;and motions to quash, based on alleged discriminations of that nature, must be supported by evidence introduced or by an actual offer of proof in regard thereto."

In the case of Ragland vs. State, 65 So. 776 it was held:

> "The defendant moved to quash the venire, on the ground that the defendant was a negro and the jurors were all white persons, and hence that there was an unlawful and unconstitutional discrimination against him on account of his race or color. No evidence or showing was offered in support of the motion, and neither the trial court nor this court will presume that the officers of the law violated either the state or the federal Constitution or statutes in the selecting or drawing of persons, as jurors, to constitute the venire in this case. There was no error in overruling the motions to quash the grand and petit juries."

It has also been held that even when there is a motion to quash filed there must be evidence of the fact that the administrative officers charged with the duty of selecting the venire excluded negroes therefrom on account of their race or color and that the affidavits of those under indictment to that effect are not alone sufficient.

> "An actual discrimination by the officers charged with the administration of statutes unobjectionable in themselves against the race of a negro on trial for a crime by purposely excluding negroes from the grand and petit juries of the county, will not be presumed but must be proved. An affidavit of the persons under indictment, annexed to a motion to quash the indictment on the ground of such discrimination, stating that the facts set up in the motion are true 'to their best knowledge, information and belief', is not evidence of the facts stated."
>
> Tarrance vs. Florida, 188 U. S. 519.

The petitioners did not file a motion to quash and the only thing that could be in any way taken as attacking the jury was the averment of the petitioners in support of their motion for a new trial that "negroes possessing necessary qualifications were systematically excluded from the jury."

In the case of United States vs. Gale, 109 U. S. 65, in dealing with a matter of this kind in the Federal Courts it was held: "An objection to the qualification of grand jurors, or to the mode of summoning or empanelling them, must be made by a motion to quash, or by a plea in abatement, before pleading in bar."

We quote from the case of Watts vs. State, 171 S. W. 202, 204.

> "It is further contended the motion in arrest of judgment should have been sustained because the defendant is a negro, and the jury commission who drew the grand jury that indicted appellant, and the jury that

tried him discriminated against him in this: The said jury commission did not draw a negro on the petit jury, and therefore, he was discriminated against, in violation to the fourteenth and fifteenth amendments to the Federal Constitution of the United States of America. And further, that defendant was in jail when the indictment was returned, and not given a chance to object to the grand jury that found the indictment. These matters come too late after the conviction. If appellant had desired to take advantage of discrimination against him because he was a negro, it should have been taken in advance of the conviction."

CONCLUSION

The laws of the State of Alabama afforded to these petitioners due process of law. The rules of procedure and practice applied to their cases are the same as are applied to all persons charged with crimes of the same nature in the State of Alabama and same are not unreasonable. The petitioners were not denied equal protection of the laws.

The judgments of the Alabama Supreme Court should be affirmed.

Dated September 24, 1932.

Respectfully submitted,

THOMAS E. KNIGHT, JR.,
Attorney General for the State of Alabama.

THOS. SEAY LAWSON,
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APPENDIX

Alabama Code of 1928

4524. INDICTABLE OFFENSES.—All felonies and all misdemeanors, originally prosecuted in the circuit court, are indictable offenses.

4526. CAPTION AND CONCLUSION.—An indictment must contain, in the caption or body thereof, the name of the state, county, court, and term in and at which it is preferred, and must conclude "against the peace and dignity of the State of Alabama."

4529. STATEMENT OF OFFENSE.—The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are the words "force of arms" or "contrary to the form of the statute" necessary.

4556 (88). RAPE.—A. B. forcibly ravished C. D., a woman, etc.

5202. OBJECTIONS TO INDICTMENT FOR DEFECT IN GRAND JURY: WHEN NOT AVAILABLE: EXCEPTIONS.—No objection can be taken to an indictment, by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law; and neither this objection nor any other can be taken to the formation of a special grand jury summoned by the direction of the court.

5203. WHEN SUCH PLEA FILED: IS SUSTAINED. NEW INDICTMENT PREFERRED; LIMITATION OF PROSECUTION.—A plea to an indictment, on the ground

that the grand jurors by whom it was found were not drawn in the presence of the officers designated by law, must if accused has been arrested be filed at the session at which the indictment is found, and if accused has not been arrested, it must be filed at the first session at which it is practicable after defendant's arrest; and in all cases before a plea to the merits; if sustained, the defendant must not be discharged, but must be held in custody or bailed, as the case may be, to answer another indictment at the same or the next term of the court; and the time elapsing between the first and second indictments, in such case, must not be computed as a part of the period limited by law for the prosecution of the offense.

5407. PUNISHMENT OF RAPE.—Any person who is guilty of the crime of rape must, on conviction, be punished, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years.

5565. CASES SET FOR PARTICULAR DAYS; EXCEPTIONS.—It is the duty of the clerk of the circuit court to set for trial all criminal cases in his court, except capital cases, and cases of parties in custody, for particular days; and no case so set shall be called for trial before such day.

5567. WHEN COUNSEL APPOINTED FOR DEFENDANT IN CAPITAL CASE.—If the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours.

5570. TRIAL, JOINT OR SEVERAL, AT THE ELECTION OF EITHER DEFENDANT.—When two or more defendants are jointly indicted, they may be tried, either jointly or separately, as either may elect.

5579. CHANGE OF VENUE; TRIAL REMOVED ON DEFENDANT'S APPLICATION ETC.—Any person charged with an indictable offense may have his trial removed to another county, on making application to the

court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found; which application must be sworn to by him, and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the supreme court or court of appeals shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on said application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court.

5580. TRIAL JUDGE MAY EX MERO MOTU ORDER CHANGE OF VENUE.—The trial judge may, with the consent of the defendant, ex mero motu, direct and order a change of venue as is authorized in the preceding section, whenever in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence.

6088. APPEALS FROM DECISIONS ON MOTIONS FOR NEW TRIALS.—Whenever a motion for a new trial shall be granted or refused by the circuit court or probate court, in any civil or criminal case at law, either party in a civil case, or the defendant in a criminal case may except to the decision of the court and shall reduce to writing the substance of the evidence in the case, and also the decision of the court on the motion and the evidence taken in support of the motion and the decision of the court shall be included in the bill of exceptions which shall be a part of the record in the cause, and the appellant may assign for error that the court below improperly granted or refused to grant a new trial, and the appellate court may grant new trials, or correct any error of the circuit court and court of like jurisdiction, or probate court in granting or refusing the same. And no presumption in favor of the cor-

rectness of the judgment of the court appealed from, shall be indulged by the appellate court.

8603. QUALIFICATIONS OF PERSONS PLACED ON JURY ROLL AND IN JURY BOX.—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

8616. DRAWING GRAND AND PETIT JURIES FROM JURY BOX.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, show-

ing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors.

8617. FAILURE TO DRAW JURIES BEFORE ADJOURNMENT OF COURT; SHALL DRAW THEM TWENTY DAYS BEFORE BEGINNING OF NEXT SESSION.—If for any reason the judge fails before the adjournment of the court, to draw the juries for the next session of the court, whether it be an adjourned session, special session, extra session, or a regular session, he shall, at least twenty days before the beginning of any of these sessions, draw the jurors which he should have drawn before the adjournment of the last session.

8630. OBJECTIONS TO INDICTMENTS; HOW TAKEN.—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court.

8632. SPECIAL AND EXTRA TERMS OR SESSIONS; JURIES FOR.—Juries, grand and petit, for any special, adjourned, or extra term or session of any court requiring grand or petit juries, which have not been drawn by the judge of the court, may be drawn by the judge in term time, or vacation, or the judge of the court may draw as many persons to serve as grand and petit jurors as he thinks necessary, and have them summoned as in cases where jurors are drawn to try capital cases.

8649. TWO OR MORE CAPITAL CASES SET FOR SAME DAY; JURIES FOR.—Whenever the judge of any court trying capital felonies shall deem it proper to set two or more capital cases for trial on the same day, said judge may draw and have summoned one jury or one venire facias of petit jurors for the trial of all such cases so set for trial on the same day.

8665. GRAND JURIES; HOW AND WHEN EMPANELED.—There shall be empaneled in every county having less than fifty thousand population, not less than two grand juries in every year, and when they have completed their labors, in its discretion the court may permit them to take a recess subject to the call of the judge of the circuit court, or chief justice of the supreme court, and may be reassembled at any place where the circuit court of the county is to be held. In all counties having over fifty thousand population, there shall be empaneled not less than four grand juries in every year.